



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6  
1445 Ross Avenue  
Dallas, Texas 75202-2733

August 18, 2011

Via e-mail – [scott.janoe@bakerbotts.com](mailto:scott.janoe@bakerbotts.com)

**CONFIDENTIAL SETTLEMENT DOCUMENT**

J. Scott Janoe  
Baker Botts L.L.P.  
One Shell Plaza  
910 Louisiana  
Houston, TX 77002-4995

Dear Scott:

Thank you for your letter of June 3, 2011 in which you set forth a three part proposal to settle this case. Your proposal involved the following: (1) immediately evaluating ways to more efficiently accumulate wastewaters and effectively neutralize pH prior to discharge into any potentially affected internal outfalls; (2) seek to delist the streams at issue; and (3) pay a \$79,100 civil penalty to resolve the violations set forth in the revised Consent Agreement and Final Order (CAFO).

We have reviewed your proposal, and make the following counteroffer:

**Compliance Order**

1. Upon the effective date of the CAFO, cease discharging D002 hazardous waste into the Solvents East Ditch unless the corrosive characteristic has been removed;
- 2.A. Within sixty (60) days of the effective date of the CAFO, submit a closure plan for the Solvents East Ditch to LDEQ for approval, with a copy sent to EPA for review.
- 2.B. Within 180 days of the effective date of the CAFO, cease discharging the K016/K019 wastestream into the Solvents East Ditch or any other land disposal unit at the facility.
- 2.C. Within 210 days of the effective date of the CAFO, submit a certification that Item 2.B. has been completed.

## CONFIDENTIAL SETTLEMENT COMMUNICATIONS

### However:

If Dow submits a request for delisting for the K016/K019 wastestream and the sediment in the Solvents East Ditch to LDEQ within thirty (30) days of the effective date of the CAFO (with a copy to EPA), then the requirements of Items 2.A – 2.C are stayed, and the delisting process proceeds.

If LDEQ fails to take action within 18 months after submission of the Delisting Petition, or the Delisting Petition is denied, then closure activities begin and/or the discharge of the K016/K019 wastestream ends, according to the schedule set out in the CAFO.

Since EPA has alleged that hazardous waste has been disposed of in an unpermitted surface impoundment, we cannot settle a case without requiring closure of the unit and stopping the discharge of the hazardous waste to the surface impoundment in the CAFO. However, our proposal would allow Dow to proceed with the delisting process without the immediate threat of closure. If the delisting petition is denied, or if the delisting process takes too long, closure and ceasing the discharge of the K016/K019 waste stream would be required according to the schedule set forth in the CAFO.

### Penalty

Dow would pay a civil penalty of \$497,016. This was calculated as follows:

Count One – Disposal of Hazardous Waste Into Unpermitted Surface Impoundment (Moderate/Major – 15% downward adjustment) .....	\$292,153
Count Two – Failure to Meet Land Disposal Restrictions (Moderate/Moderate – 15% downward adjustment) .....	\$204,863
<b>Total .....</b>	<b>\$497,016</b>

A revised draft CAFO incorporating these terms is enclosed. A copy of the revised penalty calculations is also enclosed.

Furthermore, I will not address every argument that you raised in your letter, as EPA has addressed some of these in the past. However, we reject your contention that EPA made a mistake regarding the regulatory status of the K016/K019 wastestream. There is no indication of K016 (heavy ends or distillation residues from the production of carbon tetrachloride) or K019 (heavy ends from the distillation of ethylene residues from the production of ethylene dichloride production) in the NPDES permitting documents. It is a leap of faith to conclude just because stripper effluent was mentioned in the permitting application that an EPA water permitting

## CONFIDENTIAL SETTLEMENT COMMUNICATIONS

engineer was suppose to conclude that K016 and K019 were being disposed of in an unpermitted surface impoundment. It is Dow's obligation, as the permittee, to make such representations to EPA.

EPA also rejects your contention that the penalty calculations should be based on a single transaction. According to the RCRA Civil Penalty Policy,

in the specifically limited circumstances described, enforcement personnel have discretion to forego separate gravity-based and multi-day penalties for certain distinguishable violations, so long as the total penalty for all related violations is appropriate considering the gravity of the offense and is sufficient to deter similar future behavior and recoup economic benefit.

In deciding which penalties should be compressed (i.e., the violations for which separate penalties should not be calculated), enforcement personnel should consider the seriousness of the violation, the importance of the underlying requirement to the regulatory scheme, and the economic benefit resulting from each violation. Violations that involve substantial noncompliance or that result in economic benefit that should be recaptured (see Section VIII below) should be set forth separately in the complaint.

RCRA Civil Penalty Policy at 22. As such, the Region has consistently charged both illegal disposal and land disposal restriction violations for similar conduct at other facilities.

If you have any questions, please feel free to call me at (214) 665-8074.

Sincerely



Evan L. Pearson  
Senior Enforcement Counsel

Enclosures

cc: Ryan Rosser (6EN-HE)

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TEXAS

IN THE MATTER OF:

THE DOW CHEMICAL COMPANY  
PLAQUEMINE, LOUISIANA

RESPONDENT

DOCKET NO. RCRA-06-2010-0933

**CONSENT AGREEMENT AND FINAL ORDER**

The Director of the Compliance Assurance and Enforcement Division of the United States Environmental Protection Agency (EPA), Region 6 (Complainant) and The Dow Chemical Company, Plaquemine, Louisiana in the above-referenced proceeding, hereby agree to resolve this matter through the issuance of this Consent Agreement and Final Order (CAFO).

**I. PRELIMINARY STATEMENT**

1. This proceeding for the assessment of civil penalties and the issuance of a compliance order is brought by EPA pursuant to Section 3008 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), and is simultaneously commenced and concluded through the issuance of this Consent Agreement and Final Order (CAFO) pursuant to 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and (3), and 22.37.

2. Notice of this action was given to the State of Louisiana prior to the issuance of this CAFO, as required by Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

3. For the purposes of this proceeding, the Respondent admits the jurisdictional allegations herein; however, the Respondent neither admits nor denies the specific factual allegations contained in this CAFO.

4. The Respondent explicitly waives any right to contest the allegations and its right to appeal the proposed Final Order set forth therein, and waives all defenses which have been raised or could have been raised to the claims set forth in the CAFO.

5. Compliance with all the terms and conditions of this CAFO shall resolve only those violations which are set forth herein.

6. The Respondent consents to the issuance of the CAFO hereinafter recited and consents to the issuance of the Compliance Order contained therein.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. PRELIMINARY ALLEGATIONS**

7. The Dow Chemical Company (Respondent) is a corporation incorporated under the laws of the State of Delaware and authorized to do business in the State of Louisiana.

8. "Person" is defined in L.A.C. 33:V.109 [40 C.F.R. §§ 260.10 and 270.2] as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, an any interstate body, or the federal government or any agency of the federal government."

9. The Respondent is a "person" as that term is defined in L.A.C. 33:V:109 [40 C.F.R. §§ 260.10 and 270.2].

10. "Owner" is defined in L.A.C. 33:V:109 (40 C.F.R. § 260.10) as "the person who owns a facility or part of a facility."

11. "Operator" is defined in L.A.C. 33:V:109 (40 C.F.R. § 260.10) as "whoever has legal authority and responsibility for a facility that generates, transports, treats, stores or disposes of any hazardous waste."

12. "Owner or operator" is defined in 40 C.F.R. § 270.2 as "the owner or operator of any facility or activity subject to regulation under RCRA."

13. "Facility" is defined in L.A.C. 33:V:109 (40 C.F.R. § 260.10) as meaning "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, etc.)."

14. The Respondent owns and/or operates a chemical manufacturing plant located at 21255 Highway 1, Plaquemine, Louisiana, EPA Identification No. LAD 008187080.

15. The plant identified in Paragraph 14 is a "facility" as that term is defined in L.A.C. 33:V:109 (40 C.F.R. § 260.10).

16. The Respondent is the "owner" and/or "operator" of the facility identified in Paragraph 14, as those terms are defined in L.A.C. 33:V:109 (40 C.F.R. §§ 260.10 and 270.2).

17. On or about June 2 - 4, 2008, and February 11 - 12, 2009, the Respondent's facility was inspected by a representative of EPA pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927.

## **B. VIOLATIONS**

### **Count One - Disposal of Hazardous Waste Into Unpermitted Surface Impoundments**

18. Sections 3005(a) and (e) of RCRA, 42 U.S.C. §§ 6925(a) and (e), and L.A.C. 33:V.305.A. [40 C.F.R. § 270.1(b)] provide that a permit is required for the treatment, storage, and disposal of any hazardous waste as identified or listed in L.A.C. 33:V.Chapter 49.

19. The Dow Return Canal System (Canal) is used as a source of cooling water and a conveyance for wastewater to Final Outfall 001. Water is pulled from the Mississippi River upstream from the facility and returned to the Mississippi River downstream from the facility through Final Outfall 001. The Canal consists of several segments: CWR (Cooling Water Return) Canal A, and Canals B, C, D, E, and F. CWR Canal A receives flow from Canals B, C, D, E, and F, and includes the wastewaters from all internal outfalls within the manufacturing areas as well as stormwater runoff, once through cooling water, and utility wastewaters flows. The daily flow through the Canal is approximately 597 million gallons per day.

20. The Canal was constructed in the late 1950's as an earthen ditch, and has an earthen bottom.

21. "Surface impoundment" is defined in L.A.C. 33:V.109 (40 C.F.R. § 260.10) as "a facility or part of a facility, which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds and lagoons."

22. The Canal is a "surface impoundment" as that term is defined by L.A.C. 33:V.109 (40 C.F.R. § 260.10).

23. The Respondent discharges wastewater from its EDC/Solvents Plant into the Solvents East Ditch through Internal Outfall 201<sup>1</sup>.

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<sup>1</sup> Internal Outfall 201 was originally identified as Outfall 005 in the 1977 and 1980 NPDES Permits, as Internal Outfall 521 in the 1988 and 2002 NPDES Permits, and as Internal Outfall 201 in the 2010 NPDES Permit.

24. The Solvents East Ditch has an earthen bottom.

25. The Solvents East Ditch is a "surface impoundment" as that term is defined by L.A.C. 33:V.109 (40 C.F.R. § 260.10).

26. The wastewater in the Solvents East Ditch flows into the CWR Canal A.

27. The wastewater in the Solvents East Ditch is not treated prior to it flowing into the CWR Canal A.

28. The wastewater being discharged is a "solid waste", as that term is defined in L.A.C. 33:V.109 (40 C.F.R. § 261.2).

29. According to the Respondent's readings of the pH monitors installed at Internal Outfall 201, the Respondent recorded pH readings of less than 2 and greater than 12.5 on the following days:

- A. January 16, 2006;
- B. February 8, 2006;
- C. May 17, 2006;
- D. June 28, 2006;
- E. August 3, 2006;
- F. August 6, 2006;
- G. August 9, 2006;
- H. August 23, 2006;
- I. August 31, 2006;
- J. September 12, 2006;
- K. February 19, 2007;
- L. June 12, 2007;
- M. June 18, 2007;
- N. July 9, 2007;
- O. July 18, 2007;
- P. July 20, 2007;
- Q. July 21, 2007;
- R. July 29, 2007;
- S. September 7, 2007;
- T. September 24, 2007;
- U. September 25, 2007



V. March 19, 2008; and  
W. April 23, 2008.

30. Solid waste with pH readings of less than 2 and greater than 12.5 is a hazardous waste which exhibits the characteristic of corrosivity. L.A.C. 33:V.4903.C (40 C.F.R. § 261.22).

31. On the dates identified in Paragraph 29 above, the Respondent discharged a characteristic hazardous waste (D002) from its EDC/Solvents Plant into the Solvents East Ditch, through Internal Outfall 201, which then flowed into the CWR Canal A.

32. The Respondent discharges wastewater which contains a listed hazardous waste (K016) from its EDC/Solvents Plant into the Solvents East Ditch through Internal Outfall 201, which then flows into the CWR Canal A.

33. The Respondent discharges wastewater which contains a listed hazardous waste (K019) from its EDC/Solvents Plant into the Solvents East Ditch through Internal Outfall 201, which then flows into the CWR Canal A.

34. The mixture of solid waste and a listed hazardous waste is a hazardous waste. L.A.C. 33:V.109 [40 C.F.R. § 261.3(a)(2)(iv)].

35. D002, K016, and K019 are hazardous waste identified or listed in L.A.C. 33:V.Chapter 49 (40 C.F.R. Part 261, Subparts C and D). L.A.C. 33:V:4901.C & 4093.C.

36. Internal Outfall 201 is not a “point source discharge” as that term is defined by Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2.

37. The Solvents East Ditch is not “waters of the United States” as that term is defined by 33 C.F.R. § 328.3, 40 C.F.R. § 122.2, and 40 C.F.R. § 230.3(s).

38. The Canal is not “waters of the United States” as that term is defined by 33 C.F.R. § 328.3, 40 C.F.R. § 122.2, and 40 C.F.R. § 230.3(s)(1).

39. "Disposal" is defined in L.A.C. 33:V.109 (40 C.F.R. § 260.10) as "the discharge, deposit, injection, dumping, spilling, leaking or placing of any hazardous waste into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters of the state."

40. The Respondent is disposing of hazardous waste into the Solvents East Ditch.

41. The Respondent is disposing of hazardous waste in the Canal.

42. To date, the Respondent has neither applied for nor received a RCRA permit to allow the disposal of hazardous waste into the Solvents East Ditch.

43. To date, the Respondent has neither applied for nor received a RCRA permit to allow the disposal of hazardous waste into the Canal.

44. Therefore, the Respondent has violated and continues to violate Sections 3005(a) and (e) of RCRA, 42 U.S.C. §§ 6925(a) and (e), and L.A.C. 33:V.305.A [40 C.F.R. § 270.1(b)] by disposing of hazardous waste into unpermitted surface impoundments.

#### **Count Two - Failure to Meet Land Disposal Restrictions**

45. L.A.C. III.V.2223.A (40 C.F.R. § 268.40) provides that a prohibited waste identified in L.A.C. 33:V.2299.Appendix. Table 2, may be land disposed only if it meets the requirements found in Table 2.

46. L.A.C. 33:V.2229.Appendix, Table 2 (40 C.F.R. § 268.40) identifies, among other things, the following prohibited wastes and treatment standard requirements:

A. D002 - its hazardous waste characteristic (corrosivity) must be removed and must meet treatment standards in L.A.C. 33:V.2233 (40 C.F.R. § 268.48).

B. K016 - the following constituents must be at or below the following values:

Hexachlorobenzene - 0.055  
Hexachlorobutadiene - 0.055  
Hexachlorocyclopentadiene - 0.057  
Hexachloroethane - 0.055  
Tetrachloroethylene - 0.056

C. K019 - the following constituents must be at or below the following values:

bis(2-Chloroethyl)ether - 0.033  
Chlorobenzene - 0.057  
Chloroform - 0.046  
p-Dichlorobenzene - 0.090  
1,2-Dichloroethane - 0.21  
Fluorene - 0.059  
Hexachloroethane - 0.055  
Naphthalene - 0.059  
Phenanthrene - 0.059  
1,2,4,5-Tetrachlorobenzene - 0.055  
Tetrachloroethylene - 0.056  
1,2,4-Trichlorobenzene - 0.055  
1,1,1-Trichloroethane - 0.054

47. "Land disposal" is defined in L.A.C. 33:V.2203 (40 C.F.R. § 268.2) as meaning the "placement in or on the land, except in a corrective action management unit or staging pile, and includes, but is not limited to, placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt-dome formation, salt-bed formation, underground mine or cave, or placement in a concrete vault, or bunker intended for disposal purposes.

48. The Respondent placed D002 hazardous waste into the Solvents East Ditch without treating the waste to remove its corrosive characteristic.

49. The Respondent placed D002 hazardous waste into the CWR Canal A without treating the waste to remove its corrosive characteristic.

50. The Respondent placed K016 hazardous waste into the Solvents East Ditch without treating the waste to LDR limits.

51. The Respondent placed K016 hazardous waste into the CWR Canal A without treating the waste to LDR limits.

52. The Respondent placed K019 hazardous waste into the Solvents East Ditch without treating the waste to LDR limits.

53. The Respondent placed K019 hazardous waste into the CWR Canal A without treating the waste to LDR limits.

54. Therefore, the Respondent violated L.A.C. 33:V.2223 [40 C.F.R. § 268.40] by disposing of hazardous wastes into surface impoundments without meeting the applicable treatment standards.

### **III. COMPLIANCE ORDER**

55. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), the Respondent is hereby **ORDERED** to take the following actions and provide evidence of compliance within the time period specified below:

A. Upon the effective date of this CAFO, the Respondent shall cease all discharging and/or placement activities of the D002 hazardous waste into the Respondent's Solvents East Ditch unless the requirements of 40 C.F.R. §§ 268.40 and 268.48 are met.

B. Within sixty (60) days of the effective date of this CAFO, the Respondent shall submit a closure plan for the Solvents East Ditch to LDEQ for approval, with a copy sent to EPA for review. The plan shall meet the requirements of L.A.C. 33:III.2911 (40 C.F.R. § 264.228) and L.A.C. 33:I.Chapter 13 (RECAP). In addition, the plan shall require the Respondent to

sample the sediment of the Solvents East Ditch for volatile organic analytes (VOA's), semi-volatile analytes (SVOC's), total metals, and pH using the procedures set forth in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846. The Respondent shall implement the plan as approved or modified by LDEQ according to the schedule set by LDEQ.

C. Within one hundred eighty (180) days of the effective date of this CAFO, the Respondent shall cease discharging the K016/K019 wastestream into the Respondent's Solvents East Ditch or any other land disposal unit at the facility.

D. Within two hundred ten (210) days of the effective date of this CAFO, the Respondent shall submit a certification to EPA that it has ceased all discharging and/or placement activities of K016/K019 wastestream into the Respondent's Solvents East Ditch or any other land disposal unit at the facility.

E. If the Respondent wishes to submit a Delisting Petition for the K016/K019 wastestream that is discharged from its EDC/Solvents Plant into the Solvents East Ditch through Internal Outfall 201, and the sediment in the Solvents East Ditch, it shall submit such a request to the Louisiana Department of Environmental Quality (LDEQ) within thirty (30) days of the effective date of this CAFO, with a copy sent to EPA. If the Respondent timely submits such a request, the requirements of Paragraphs 55.B – 55.D are stayed, and Paragraphs 55.E - O become effective.

F. Within sixty (60) days of the effective date of this CAFO, the Respondent shall submit its proposed sampling and analysis plan (SAP) for the delisting to LDEQ for approval, with a

copy sent to EPA for review. The Respondent shall implement the SAP according to the schedule set forth therein.

G. The Respondent shall give EPA at least ten (10) days prior notice of any sampling required for the Delisting Petition.

H. At EPA's request, the Respondent shall provide or allow split or duplicate samples to be taken by EPA or EPA's authorized representative.

I. The Respondent shall submit a copy of all analytical results, including all Quality Assurance/Quality control documents, to EPA within ten (10) days after the Respondent has received the results.

J. Within one hundred twenty (120) days of the effective date of this CAFO, the Respondent shall submit a Delisting Petition to LDEQ for approval, with a copy sent to EPA for review. The Delisting Petition shall include the K016/K019 wastestream that is discharged from its EDC/Solvents Plant into the Solvents East Ditch through Internal Outfall 201, and the sediment in the Solvents East Ditch.

K. Every thirty (30) days following submission of the Delisting Petition to LDEQ, the Respondent shall submit a Status Report to EPA, detailing the efforts it has made to ensure that LDEQ makes a timely decision on its Delisting Petition.

L. The Respondent shall notify EPA within five (5) days of receipt of LDEQ's decision on its Delisting Petition.

M. If LDEQ fails to take action on the Respondent's Delisting Petition within eighteen (18) months after submission of the Delisting Petition, the Respondent shall begin implementation of closure activities. The closure plan required by Paragraph 55.B shall be

submitted within twenty (20) months after submission of the Delisting Petition, the discharge of the K016/K019 wastestream into the Solvents East Ditch shall cease twenty-four (24) months after submission of the Delisting Petition as mandated by Paragraph 55.C, and the Certification required under Paragraph 55.D shall be submitted twenty-five months (25) months after submission of the Delisting Petition.

N. If LDEQ denies the petition for delisting the sediment in the Solvents East Ditch, within sixty (60) days from receipt of notification that the delisting petition is denied, the Respondent shall submit a closure plan for the Solvents East Ditch to LDEQ for approval, with a copy sent to EPA for review. The plan shall meet the requirements of L.A.C. 33:III.2911 (40 C.F.R. § 264.228) and L.A.C. 33:I.Chapter 13 (RECAP). In addition, the plan shall require the Respondent to sample the sediment of the Solvents East Ditch for volatile organic analytes (VOA's), semi-volatile analytes (SVOC's), total metals, and pH using the procedures set forth in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846. The Respondent shall implement the plan as approved or modified by LDEQ according to the schedule set by LDEQ.

O. If LDEQ denies the petition for delisting the K016/K019 wastestream, within ninety (90) days from receipt of notification that the delisting petition is denied, the Respondent shall cease discharging the K016/K019 wastestream into the Respondent's Solvents East Ditch or any other land disposal unit at the facility. The Respondent shall submit the certification required in Paragraph 55.D within one hundred twenty (120) days from receipt of notification that the delisting petition is denied.

P. In all instances in which this Compliance Order requires written submissions to EPA, each submission must be accompanied by the following certification:

"I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Q. Copies of all documents required by this Compliance Order shall be sent to the following:

Chief, Compliance Enforcement Section (6EN-HE)  
Hazardous Waste Enforcement Branch  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Cheryl Nolan  
Waste Enforcement Group  
Office of Environmental Compliance  
Louisiana Department of Environmental Quality  
602 North 5<sup>th</sup> Street  
Baton Rouge, LA 70802

#### **IV. TERMS OF SETTLEMENT**

##### **A. CIVIL PENALTY**

56. Pursuant to the authority granted in Section 3008 of RCRA, 42 U.S.C. § 6928, and upon consideration of the entire record herein, including the Findings of Fact and Conclusions of Law, which are hereby adopted and made a part hereof, and upon consideration of the seriousness of the alleged violations, the Respondent's good faith efforts to comply with the applicable regulations, and the June 2003 RCRA Civil Penalty Policy, it is hereby **ORDERED** that the Respondent be assessed a civil penalty of **Four Hundred Ninety-Seven Thousand Sixteen Dollars (\$497,016)**.



57. Within thirty (30) days of the effective date of this CAFO, the Respondent shall pay the assessed civil penalty by certified check, cashier's check, or wire transfer, made payable to "Treasurer, United States of America, EPA - Region 6". Payment shall be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check(s) should be remitted to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check(s) should be remitted to:

U.S. Bank  
Government Lockbox 979077  
US EPA Fines & Penalties  
1005 Convention Plaza  
SL-MO-C2-GL  
St. Louis, MO 63101  
Phone No. (314) 418-1028

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York  
ABA: 021030004  
Account No. 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 of the Fedwire message should read  
"D 68010727 Environmental Protection Agency"

**PLEASE NOTE: Docket number RCRA-06-2010-0933 shall be clearly typed on the check to ensure proper credit.** If payment is made by check, the check shall also be accompanied by a transmittal letter and shall reference the Respondent's name and address, the case name, and

docket number of the CAFO. If payment is made by wire transfer, the wire transfer instructions shall reference the Respondent's name and address, the case name, and docket number of the CAFO. The Respondent shall also send a simultaneous notice of such payment, including a copy of the check and transmittal letter, or wire transfer instructions to the following:

Chief, Compliance Enforcement Section (6EN-HE)  
Hazardous Waste Enforcement Branch  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Lorena Vaughn  
Regional Hearing Clerk (6RC-D)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

The Respondent's adherence to this request will ensure proper credit is given when penalties are received in the Region.

58. The Respondent agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

59. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's

administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. *See* 40 C.F.R. § 13.11(b).

60. EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period that the penalty remains unpaid. In addition, a penalty charge of up to six percent per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. *See* 40 C.F.R. § 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. *See* 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

#### **B. PARTIES BOUND**

61. The provisions of this CAFO shall apply to and be binding upon the parties to this action, their officers, directors, agents, employees, successors, and assigns. The undersigned representative of each party to this CAFO certifies that he or she is fully authorized by the party whom he or she represents to enter into the terms and conditions of this CAFO and to execute and to legally bind that party to it.

#### **C. STIPULATED PENALTIES**

62. In addition to any other remedies or sanctions available to EPA, if the Respondent fails or refuses to comply with any provision of Section III of this CAFO, the Respondent shall pay stipulated penalties in the following amounts for each day during which each failure or refusal to comply continues:

<u>Period of Noncompliance</u>	<u>Penalty Per Violation Per Day</u>
1st through 15th day	\$ 1,000
16th through 30th day	\$ 1,500
31st day and beyond	\$ 2,500

Penalties shall accrue from the date of the noncompliance until the date the violation is corrected, as determined by EPA.

63. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of Paragraph 57 herein. Interest and late charges shall be paid as stated in Paragraphs 59 - 60 herein.

64. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of the Respondent's violation of this CAFO or of the statutes and regulations upon which this agreement is based, or for the Respondent's violation of any applicable provision of law.

#### **D. DISPUTE RESOLUTION**

65. If the Respondent objects to any decision or directive of EPA in regard to Section III, the Respondent shall notify the following persons in writing of its objections, and the basis for those objections, within fifteen (15) calendar days of receipt of EPA's decision or directive:

Associate Director  
Hazardous Waste Enforcement Branch (6EN-H)  
Compliance Assurance and Enforcement Division  
U.S. EPA - Region 6  
1445 Ross Avenue  
Dallas, TX 75202-2733

Chief, RCRA Enforcement Branch (6RC-ER)  
Office of Regional Counsel  
U.S. EPA - Region 6  
1445 Ross Avenue  
Dallas, TX 75202-2733

66. The Associate Director of the Hazardous Waste Enforcement Branch or his/her designee (Associate Director), and the Respondent shall then have an additional fifteen (15) calendar days from EPA's receipt of the Respondent's written objections to attempt to resolve the dispute. If an agreement is reached between the Associate Director and the Respondent, the agreement shall be reduced to writing and signed by the Associate Director and the Respondent and incorporated by reference into this CAFO.

67. If no agreement is reached between the Associate Director and the Respondent within that time period, the dispute shall be submitted to the Director of the Compliance Assurance and Enforcement Division or his/her designee (Division Director). The Division Director and the Respondent shall then have a second 15-day period to resolve the dispute. If an agreement is reached between the Division Director and the Respondent, the resolution shall be reduced to writing and signed by the Division Director and Respondent and incorporated by reference into this CAFO. If the Division Director and the Respondent are unable to reach agreement within this second 15-day period, the Division Director shall provide a written statement of EPA's decision to the Respondent, which shall be binding upon the Respondent and incorporated by reference into the CAFO.

68. If the Dispute Resolution process results in a modification of this CAFO, the modified CAFO must be approved by the Regional Judicial Officer and filed pursuant to Section IV.F (Modifications).

**E. NOTIFICATION**

69. Unless otherwise specified elsewhere in this CAFO, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it shall be directed to the individuals specified below at the addresses given (in addition to any action specified by law or regulation), unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

EPA: Chief, Compliance Enforcement Section (6EN-HE)  
Hazardous Waste Enforcement Branch  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Respondent:

**F. MODIFICATION**

70. The terms, conditions, and compliance requirements of this CAFO may not be modified or amended except as otherwise specified in this CAFO, or upon the written agreement of both parties, and approved by a Regional Judicial Officer, and such modification or amendment being filed with the Regional Hearing Clerk.

**G. RETENTION OF ENFORCEMENT RIGHTS**

71. EPA does not waive any rights or remedies available to EPA for any other violations by the Respondent of Federal or State laws, regulations, or permitting conditions.

72. Nothing in this CAFO shall limit the power and authority of EPA or the United States to take, direct, or order all actions to protect public health, welfare, or the environment, or prevent, abate or minimize an actual or threatened release of hazardous substances, pollutants, contaminants, hazardous substances on, at or from the Respondent's facility. Furthermore, nothing in this CAFO shall be construed to prevent or limit EPA's civil and criminal authorities, or that of other Federal, State, or local agencies or departments to obtain penalties or injunctive relief under other Federal, State, or local laws or regulations.

#### **H. INDEMNIFICATION OF EPA**

73. Neither EPA nor the United States Government shall be liable for any injuries or damages to person or property resulting from the acts or omissions of the Respondent, their officers, directors, employees, agents, receivers, trustees, successors, assigns, or contractors in carrying out the activities required by this CAFO, nor shall EPA or the United States Government be held out as a party to any contract entered into by the Respondent in carrying out the activities required by this CAFO.

#### **I. COSTS**

74. Each party shall bear its own costs and attorney's fees. Furthermore, the Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under 5 U.S.C. § 504 and 40 C.F.R. Part 17.

#### **J. EFFECTIVE DATE**

75. This CAFO, and any subsequent modifications, become effective upon filing with the Regional Hearing Clerk.

**THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS CONSENT  
AGREEMENT AND FINAL ORDER:**

**FOR THE RESPONDENT:**

Date: \_\_\_\_\_

\_\_\_\_\_  
The Dow Chemical Company



**FOR THE COMPLAINANT:**

Date: \_\_\_\_\_

---

John Blevins  
Director  
Compliance Assurance and  
Enforcement Division

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2011, the original and one copy of the foregoing Consent Agreement and Final Order (CAFO) was hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and that a true and correct copy of the CAFO was were placed in the United States Mail, certified mail, return receipt requested, \_\_\_\_\_ addressed to the following:

J. Scott Janoe  
Baker Botts L.L.P.  
One Shell Plaza  
910 Louisiana  
Houston, TX 77002-4995

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**CONFIDENTIAL SETTLEMENT COMMUNICATION**

**THE DOW CHEMICAL COMPANY  
PLAQUEMINE, LOUISIANA**

**RCRA CIVIL PENALTY SUMMARY**

Count One - Disposal of Hazardous Waste Into Unpermitted Surface Impoundments - Sections 3005(a) and (e) of RCRA, 42 U.S.C. §§ 6925(a) and (e), and L.A.C. 33:V.305.A. [40 C.F.R. § 270.1(b)] .....	\$292,153
Count Two - Failure to Meet Land Disposal Restrictions L.A.C. 33:V.2223.A. [40 C.F.R. § 268.40] .....	\$204,863
<b>TOTAL PROPOSED PENALTY .....</b>	<b>\$497,016</b>

# BAKER BOTTS LLP

ONE SHELL PLAZA  
910 LOUISIANA  
HOUSTON, TEXAS  
77002-4995

TEL +1 713.229.1234  
FAX +1 713.229.1522  
www.bakerbotts.com

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NEW YORK  
PALO ALTO  
RIYADH  
WASHINGTON

## CONFIDENTIAL SETTLEMENT MATERIALS SUBJECT TO FRE 408

June 3, 2011

Mr. Evan L. Pearson  
Senior Enforcement Counsel, RCRA Enforcement Branch  
U.S. EPA - Region 6  
1445 Ross Avenue  
Dallas, TX 75202-2733

J. Scott Janoe  
TEL +1 (713) 229-1553  
FAX +1 (713) 229-7953  
scott.janoe@bakerbotts.com

Re: Revised Draft Consent Agreement and Final Order --  
The Dow Chemical Company, Plaquemine, Louisiana

Dear Evan:

Thank you for your letter of March 30, 2011 regarding the regulation of Outfall 521 at Dow's Plaquemine Chemical Plant (the "Facility"). We appreciate your willingness to discuss ways of resolving this matter amicably.

Dow continues to believe that application of RCRA to NPDES-monitored and regulated outfalls would constitute duplicative regulation. Both the Louisiana Department of Environmental Quality ("LDEQ") and EPA have addressed these outfalls exclusively under the NPDES program for over two decades. While we understand the position that you have taken in the current dispute, there can be no question that it marks an abrupt change in the way in which both agencies have addressed this issue. As such, we remain convinced that enforcement under RCRA is not warranted. That being said, Dow is committed to resolving this issue.

In a good faith effort to settle this matter, Dow proposes to:

- (1) immediately evaluate ways to more efficiently accumulate wastewaters and effectively neutralize pH prior to discharge into any potentially affected internal outfalls;
- (2) seek to de-list the streams at issue; and
- (3) pay a civil penalty in the amount of \$79,100 to resolve the excursions cited in the revised Consent Agreement and Final Order.

As explained in more detail below, we believe that this offer is supported by the facts and the law. The alleged violations involve -- at most -- miniscule amounts of pollutants in diluted discharges. Indeed, the amounts and concentrations of pollutants possibly implicated in these operations are dwarfed by the amounts and concentrations of similar discharges categorically

exempted from regulation by EPA. Such miniscule amounts of pollutants simply do not pose a risk to any receptors. In addition, the Facility's good faith compliance with the Clean Water Act regulatory scheme does not appear to have been taken into account in calculating the proposed penalty. Dow reasonably relied on the terms, conditions, limitations and allowances contained in numerous NPDES permits – permits that were written and, except in its most recent iteration, issued by EPA. Dow has likewise relied upon the terms of its RCRA permits. Going back more than thirty years, the NPDES and RCRA permit each clearly acknowledges, and more importantly, permits both the configuration of these units and the possibility that trace amounts of listed waste could be present in the regulated discharge. Even viewed in the light most favorable to EPA -- Dow, LDEQ, and EPA all made the same mistake for decades. Such facts do not warrant the imposition of over \$600,000 in penalties. Finally, nothing about these discharges suggests the need for initiating risk-based remediation or corrective action.

**A. EPA's position invites unnecessary duplicative regulation**

EPA does not refute the fact that the Facility's NPDES permit includes discharge limits on the process and utility wastewater discharged from Outfall 521. *See* DOW LPDES Permit App 1.5 (May 2006). These "upstream" discharge limits were specifically requested by EPA, and have long been, and continue to be, enforceable Clean Water Act ("CWA") compliance limits under the Facility's NPDES permit. Because the purpose of the RCRA permitted discharge exclusion is "to avoid duplicative regulation of point source discharges under RCRA and the Clean Water Act," and because LDEQ and EPA have long viewed the NPDES permit as the appropriate compliance mechanism for Outfall 521, EPA's current position is a departure from many years of regulatory practice at the Facility.

The upstream canals at the Facility are similar to the upstream treatment swamp in *Williams Pipe Line Co. v. Bayer Corp.* 964 F. Supp. 1300, 1325-6 (S.D. Iowa 1997). Because the NPDES permit insures that discharges to and from the canal meet federal standards, adding additional RCRA permit requirements to the existing NPDES requirements would be the exact form of duplicative regulation that the statutes intended to avoid. *See Williams Pipe Line Co.* at 1326.

That the Facility considered Outfall 521 to be "upstream" or "internal" does not change the fact that both LDEQ and EPA have never suggested that RCRA permitting requirements apply to this or similar discharges, or that land disposal restrictions apply to the canals.<sup>1</sup> EPA's suggestion that RCRA, and not the CWA, now applies to Outfall 521 is an abrupt shift in its historical approach to regulatory management of the facility. If anything, this issue should have been resolved internally by EPA in any of the multiple permitting rounds that have happened over the last two decades. *See* RCRA Online No. 12826 (concluding that

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<sup>1</sup> Other similar incinerator waste streams include the effluent from the scrubber at the Vinyl 2 plant and from chlorinated methanes. Taken to its extreme, EPA's position would implicate rainwater that rolls off the on-site landfill. There is no discernible benefit from regulating these discharges under RCRA.

“[w]here complexities regarding program jurisdiction arise, EPA will resolve the issues internally”).

**B. EPA’s penalty is disproportionately high**

A penalty of nearly \$700,000 is not justified. The harm from the few alleged excursions does not rise to the level of “significant harm.” Likewise, because any violation occurred at the intersection of both RCRA and CWA, and the Facility complied with CWA requirements, this is not a case of substantial noncompliance with a regulatory program. Finally, EPA’s RCRA Penalty Policy indicates that penalties based on a failure to obtain a permit should not be coupled with a failure to fulfill RCRA requirements because such penalties will be “disproportionately high.”

**1. Risk of Exposure**

The risk of exposure component of the penalty matrix should be scored “Minor.” The few daily and extremely small deviations listed in the Revised Consent Agreement suggest that there was no evidence of release and only minimal probability of exposure or transport of the wastes to sensitive receptors, particularly considering the location of the exceedances in the canal and the significant dilution of the wastes in the canal (which were already diluted when they were discharged). In fact, any waste at issue is likely present in amounts and at concentrations less than the *de minimis* amounts of waste that are routinely allowed under RCRA’s *de minimis* exemption.

As we have previously noted, the streams at issue are treated effluent from a TSCA-rated incinerator operated in full compliance with RCRA requirements and the Hazardous Waste Combustion MACT. The streams are treated to levels well below applicable treatment and land disposal requirements. Any miniscule amount of residual material left in these streams upon discharge cannot be said to pose a significant -- or even identifiable -- risk to human health or the environment.

The NPDES monitoring procedures in place at Outfall 521 (and other similar outfalls) should also be accounted for both in terms of the probability for exposure, and the harm to the RCRA regulatory program. EPA does not, nor can it, allege that the Facility mishandled any wastes. Instead, the Facility is caught in the technical application of regulations at the intersection of two laws, CWA and RCRA. At a minimum, because the NPDES permitting regulatory requirements always applied to Outfall 521, at least one regulatory regime applied; this is not a case of completely unregulated management of wastes.

Since the alleged violation poses only a low risk of exposure to humans and other environmental receptors and will have a small adverse effect for implementing the RCRA program, the risk of exposure for RCRA penalty calculation purposes should be scored “Minor.”

## **2. Extent of Deviation**

The classification of the violation as a major deviation from the regulatory requirements is also unwarranted. The allegation that the Facility undermined the statutory or regulatory purposes of the program fails to consider the fact that the Facility was in compliance with CWA requirements. Even if the extent of the deviation from RCRA requirements may be significant, it cannot reasonably be suggested that most requirements were not met when CWA permitting is accounted for. Thus, any technical non-compliance with RCRA permitting requirements should be considered -- at most -- a "Moderate," and not a "Major," violation.<sup>2</sup>

## **3. Penalty calculations should be based on a single transgression**

EPA's RCRA Penalty Policy includes guidelines related to the compression of penalties for related violations. As EPA notes:

There are instances where a company's failure to satisfy one statutory or regulatory requirement either necessarily or generally leads to the violations of numerous other independent regulatory requirements. Examples are the case where: (1) a company through ignorance of the law fails to obtain a permit or interim status as required by Section 3005 of RCRA and as a consequence runs afoul of the numerous other (regulatory) requirements imposed on it by 40 CFR Part 265 .... In cases such as these where multiple violations result from a single initial transgression, assessment of a separate penalty for each distinguishable violation may produce a total penalty which is disproportionately high.<sup>3</sup>

As in this example from the Penalty Policy, EPA has alleged two separate violations that are the result of the same alleged transgression at the Facility: failing to obtain a permit for listed wastes that are then impermissibly disposed of in surface impoundments. Despite this fact, EPA has sought identical penalty amounts (\$343,710) for ostensibly separate violations. Because both violations stem from the same set of facts, penalties should not be double-counted. Compression is further warranted by the fact that Dow has at all times informed both LDEQ and EPA of the facts that give rise to the alleged permitting issue. Dow's decades of good faith disclosure and reasonable reliance upon agency-issued NPDES and RCRA permits justify the application of only a single violation.

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<sup>2</sup> Note that with a minor-moderate gravity component, multi-day penalties are discretionary. See EPA RCRA Penalty Policy at 26. Because pH exceedances are "one-off" upsets and measured concentrations of halocarbons in effluent are generally below Land Disposal Restriction requirements, there is also no evidence of a continuing violation.

<sup>3</sup> EPA RCRA Penalty Policy at 21-22.

# BAKER BOTTS LLP

ONE SHELL PLAZA  
910 LOUISIANA  
HOUSTON, TEXAS  
77002-4995

TEL +1 713.229.1234  
FAX +1 713.229.1522  
www.bakerbotts.com

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## CONFIDENTIAL SETTLEMENT MATERIALS SUBJECT TO FRE 408

J. Scott Janoe  
TEL +1 (713) 229-1553  
FAX +1 (713) 229-7953  
scott.janoe@bakerbotts.com

April 19, 2011

Mr. Evan L. Pearson  
Senior Enforcement Counsel, RCRA Enforcement Branch  
U.S. EPA - Region 6  
1445 Ross Avenue  
Dallas, TX 75202-2733

Re: Draft Consent Agreement and Final Order --  
The Dow Chemical Company, Plaquemine, Louisiana

Dear Evan:

I am writing in response to your letter of March 30, 2011. We continue to disagree with your characterization of the law in this case. But as the saying goes, reasonable minds can disagree. Accordingly, we accept your offer to continue these negotiations, and will prepare a counteroffer accordingly. We anticipate being in a position to submit a detailed counteroffer by June 1<sup>st</sup>. Shortly thereafter, we would like an opportunity to meet and discuss our counteroffer subject to your and our availability.

As always, please feel free to contact me at 713.229.1553.

Sincerely,



J. Scott Janoe

JSJ/0198